

***IN THE UNITED STATES PATENT AND TRADEMARK OFFICE***

Applicant: John Trezza  
Title: REDUNDANT OPTICAL DEVICE ARRAY  
Appl. No.: 09/896,797  
Filing Date: 06/29/2001  
Examiner: Agustin Bello  
Art Unit: 2613  
Conf. No.: 8282

**REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT FOR  
PATENT APPLICATION UNDER 37 C.F.R. §1.705(b)**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Applicants have calculated PTA for the captioned patent application and have determined that the patent is entitled to 1814 days of Patent Term Adjustment, as shown on the attached sheet, which shows the relevant delays under 37 CFR §§1.702, 1.703 and 1.704:

(a) Total PTO delay: 2,251 days

(b) Total Applicant delay: 437 days

Final PTA Determination under 37 CFR §1.703(f): 1,814 days

In accordance with 1.705(b)(2)(ii), the relevant dates as specified in §§1.703(a) through (e) for which an adjustment is sought and the adjustment as specified in § 1.703(f) to which the patent is entitled are clearly represented in the attached PTA Calculation.

The relevant dates where the applicant is not in agreement with the PTO's determination are discussed in more detail below.

At the time of allowance, the Patent Office determined that the patent was entitled to 761 days of PTA. Applicants believe that this PTA determination was made in accordance with the

“Explanation of 37 CFR 1.703(f) and of the United States Patent and Trademark Office Interpretation of 35 U.S.C. §154(b)(2)(A)” published at 69 Fed. Reg. 34238 (Jun. 21, 2004). Under that interpretation of the PTA statute, any PTO delay under 35 U.S.C. § 154(b)(1)(A) is deemed to overlap with any 3-year maximum pendency delay under 35 U.S.C. § 154(b)(1)(B), and so, as a practical effect, PTA may be awarded under §154(b)(1)(A) or §154(b)(1)(B), but not both.

On January 7, 2010, the U.S. Court of Appeals for the Federal Circuit affirmed the September 30, 2008 decision of the United States District Court for the District of Columbia finding that the U.S. Patent and Trademark Office’s interpretation of the PTA statute is incorrect. *Wyeth v. Kappos*, No. 2009-1120 (Jan. 7, 2010). The Federal Circuit determined that “[b]efore the three-year mark, no ‘overlap’ can transpire between the A delay and the B delay,” and that “[i]f an A delay occurs on one day and a B delay occurs on a different day, those two days do not ‘overlap’ under section 154 (b)(2).” A Request for Continued Examination was filed in the application prior to allowance, and Patent Term Adjustment accordingly stopped accruing under 37 C.F.R. §1.703(b) on February 21, 2008. This PTA component was accordingly “ripe” at the time of allowance and accordingly could have been incorporated into the PTO’s determination of PTA.

37 C.F.R. §1.705(d) states that “Any request for reconsideration under this section that raises issues that were raised, or could have been raised, in an application for patent term adjustment under paragraph (b) of this section shall be dismissed as untimely as to those issues.” As the above-identified issue could arguably be raised under paragraph (b), the applicant is filing this request for reconsideration under an abundance of caution, in the knowledge that the PTO does not include patent term adjustment resulting from 37 C.F.R. §1.703(b) in its PTA calculations at allowance, even if PTA has stopped accruing due to the filing of an RCE.

In accordance with §1.705(b)(2)(iv)(A), the circumstances during the prosecution of the application resulting in the patent that constitute a failure to engage in reasonable efforts to conclude processing or examination of such application as set forth in § 1.704 are clearly represented in the attached PTA Calculation.

Applicants therefore respectfully request that the patent be accorded 1,814 days PTA.

Fees in the amount of \$200.00 set forth in 37 C.F.R. § 1.18(e) to cover the fee for this request are being paid by credit card via EFS-Web.

The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. § 1.705, or credit any overpayment, to Deposit Account No. 19-0741. Should no proper payment be enclosed herewith, as by the credit card payment instructions in EFS-Web being incorrect or absent, resulting in a rejected or incorrect credit card transaction, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 19-0741.

However, because this PTA error is due to a Patent Office error in interpreting and applying the PTA statute, a refund of the fee is respectfully requested.

Respectfully submitted,

Date: September 30, 2010

By: /Marcus W. Sprow/

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## Patent Term Adjustment Calculation System

Add a new event to this case

Docket Number: 088245-4667

Application Number: 09/896797

Patent Number: N/A

	Event Description	Event Date	Days from Filing	PTO Days	Applicant Days
Edit Delete	Application Filing Date	06/29/2001	0		
	14 month From Application date	08/29/2002	426		
	3 Year Period Starts	06/29/2004	1,096		
Edit Delete	Non-Final Office Action	04/14/2005	1,385	(959)	
	Non-Final Office Action + 3 months	07/14/2005	1,476		
Edit Delete	Non-Final Office Action Rsp. Rcv'd at PTO	10/14/2005	1,568		92
Edit Delete	Non-Final Office Action	01/24/2006	1,670		
	Non-Final Office Action + 3 months	04/24/2006	1,760		
Edit Delete	Non-Final Office Action Rsp. Rcv'd at PTO	07/20/2006	1,847		
Edit Delete	Notice of Non-Compliance	10/04/2006	1,923		
Edit Delete	Non-Final Office Action Rsp. Rcv'd at PTO	10/13/2006	1,932		(172), (85) 172
	Non-Final Office Action Rsp. Rcv'd at PTO + 4 mo	02/13/2007	2,055		
Edit Delete	Non-Final Office Action	07/11/2007	2,203	(148)	
Edit Delete	Non-Final Office Action Rsp. Rcv'd at PTO	10/11/2007	2,295		
	Non-Final Office Action + 3 months	10/11/2007	2,295		
Edit Delete	Notice of Non-Compliance	12/26/2007	2,371		
Edit Delete	Non-Final Office Action Rsp. Rcv'd at PTO	12/28/2007	2,373		(78), (78) 78
	Non-Final Office Action Rsp. Rcv'd at PTO + 4 mo	04/28/2008	2,495		
Edit Delete	Final Office Action	07/28/2008	2,586	(91)	
	3 Year Period Stopped	10/27/2008	2,677	(1581) 2251	
Edit Delete	Request For Continued Examination (including amendment)	10/28/2008	2,678		
Edit Delete	Final Office Action Response Received at PTO	10/28/2008	2,678		
Edit Delete	Non-Final Office Action	01/05/2009	2,747		
Edit Delete	Non-Final Office Action Rsp. Rcv'd at PTO	04/03/2009	2,835		
Edit Delete	Final Office Action	05/29/2009	2,891		
Edit Delete	Final Office Action Response Received at PTO	07/29/2009	2,952		

Edit Delete	Advisory Action	08/07/2009	2,961	
Edit Delete	Request For Continued Examination (including amendment)	08/27/2009	2,981	
Edit Delete	IDS under 1.704(c)(8) filed at PTO	10/22/2009	3,037	56
Edit Delete	Final Office Action	11/12/2009	3,058	
Edit Delete	Request For Continued Examination (including amendment)	02/05/2010	3,143	
Edit Delete	IDS under 1.704(c)(8) filed at PTO	03/16/2010	3,182	39
Edit Delete	Non-Final Office Action	03/18/2010	3,184	
Edit Delete	Non-Final Office Action Rsp. Rcv'd at PTO	06/15/2010	3,273	
Edit Delete	Notice of Allowance	07/06/2010	3,294	
	Projected Patent Grant Date	01/18/2011	3,490	
			Totals:	2,251 437
			PTA:	1,814

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**FOLEY & LARDNER LLP**

Version: 3.02.10

LOGIN: Linda Anderson

IP: 10.24.4.21

Foley &amp; Lardner LLP